United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1150

To be argued by
SHEILA GINSBERG

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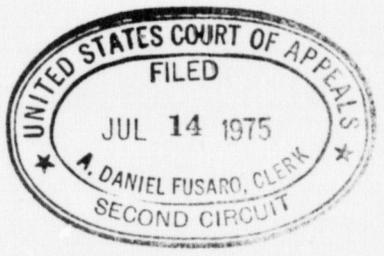
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- STUART STEINBERG, WILLIAM CAPO, HOWARD KAYE, and JAMES PARKER, Appellants.	Docket No. 75-1150

REPLY BRIEF FOR APPELLANT
WILLIAM CAPO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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I

Despite the Government's attempt at obfuscation, the first issue raised by appellant Capo on this appeal remains simply whether the application for the wiretap order provided sufficient information from which a judicial officer could make an independent determination as to the availability of alternative investigative procedures, as he is

required to do under 18 U.S.C. §§2518(1)(c) and (3)(c). Irrelevant to this issue is the Government's assertion (Government Brief at 21-23) that the statute does not require that the agents actually try other means of investigation before seeking a wiretap order. The critical factor, as acknowledged by the Government's own authorities, is that the application must set forth with specificity the facts which establish why the normal investigative procedures are unavailable.* United States v. Curreri, 388 F.Supp. 697, 620 (D.Md. 1974).

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*All the authorities cited by the Government (Government Brief at 21-22) are unanimous in holding that the application must provide sufficient data to inform the judicial officer of the unavailability of other investigative techniques. S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) analyzes this provision of the statute as requiring that a "showing" of unavailability be made in the wiretap application. Similarly, in United States v. Staino, 358 F.Supp. 852, 857 (E.D.Pa. 1973), the district court found that the "affidavit amply demonstrated that [obtaining necessary evidence] would have been impossible by any means other than the use of wiretaps."

In United States v. King, 335 F.Supp. 523 (S.D.Cal. 1971), modified on other grounds, 478 F.2d 494 (9th Cir.), cert. denied, 414 U.S. 846 (1973), the affidavit clearly established the unavailability of visual or radar surveillance of a boat that was to chart waters 1,000 miles off the United States coast.

In both United States v. Whitaker, 343 F.Supp. 358 (E.D. Pa. 1972), reversed on other grounds, 474 F.2d 1246 (3d Cir.), cert. denied, 412 U.S. 950 (1973), and United States v. Askins, 351 F.Supp. 408, 414 (D.Md. 1972), the affidavits explicitly established that known witnesses were unavailable to testify and further, in Whitaker, the affidavit included a detailed explanation of why a traditional search warrant would not produce the needed evidence.

The affidavits in this case fail monumentally to articulate the necessary facts.* First, Noone's affidavit at ¶11** asserts in a conclusory fashion that "[n]ormal investigative procedures have not succeeded in establishing the full extent of the activities conducted by Stuart Steinberg...." Regardless of the fact that Noone may not have been required to resort to other techniques, having done so his failure to elucidate what those methods were and why they failed necessarily had the effect of insulating the agent's procedures from judicial scrutiny, the very evil sought to be avoided by the statute.

The deficiencies in the affidavit cannot, as the Government would have it (Government Brief at 23-24), be erased nunc pro tunc by assertions of the failure of visual surveillance which were subsequently testified to at trial and are now argued on appeal. The point is that these assertions were not made in the affidavit; consequently they were not considered by Judge Stewart when he signed the wiretap order.

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*Disingenuous at best is the Government's contention (Government Brief at 23) that this Court should defer to the issuing judge's evaluation of the facts when the issue in this case is the very existence of sufficient facts in the affidavit from which to make a valid determination. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).

**The affidavit, which is part of the July 20, 1973, wiretap order, is annexed as "D" to appellant Capo's separate appendix.

Similarly, Noone's assertions that normal investigative procedures were unlikely to succeed in the future (Noone affidavit, ¶11 a, b) are fatally undermined by Noone's reliance for this conclusion on his general experience with narcotics dealers. The only facts presented to Judge Stewart in the wiretap application indicate that Agent Noone's investigation involved the distribution of phencyclidene hydrochloride, a non-narcotic controlled substance (Noone affidavit, ¶3a). Nowhere does the affidavit assert that Steinberg was involved in the sale of cocaine, nor does it establish that those who sell phencyclidene hydrochloride function with the same caution and expert cover of narcotics dealers.* As the court noted in United States v. Currerri, supra, 388 F.Supp. at 620, when finding the application there insufficient:

> While there may have been eminently sound reasons why these investigative techniques were not considered to be likely to succeed if tried, those reasons were not made known to [the judge] in the application, nor was [the judge] told in the application that those techniques had been used but had proved unsuccessful.

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*Once again the Government (Government Brief, fn. at 20) seeks to compensate for deficiencies in the affidavit by resorting to facts elicited at trial concerning Steinberg's interest in selling cocaine. Not only is this evidence irrelevant on the question of the sufficiency of Noone's affidavit, it is also non-probative on the question of what Noone actually knew when he signed the affidavit, there being no indication that the cocaine proposal was discussed before the wiretap application was made. This failing, the Government has the temerity to suggest that it is appellant who has the burden of establishing a distinction in the modus operandi of the organized crime figures who deal in heroin and cocaine, as opposed to those persons who sell marijuana, pills, and PCP.

The fact that prior to the wiretap application Steinberg had actually transferred PCP to Noone, and the further fact that Noone had witnessed Steinberg's use of the telephone (Government Brief at 20-21), while probative on the uncontested question of probable cause, are nonetheless insufficient on the question of availability of other investigative procedures.* In this context, Steinberg's single assertion to "his people," intentionally made within Noone's hearing, that Noone concurred in their reluctance to meet one another can be viewed merely as an assurance to Noone that his identity was secure. In any event, the isolated statement is of no significance in light of the affidavit's descriptions of Steinberg's open and guileless dealings with both Noone and Agent Anderson (Capo Main Brief at 19).

Finally, the Government's attempt to convert Steinberg's dealings into a large-scale conspiracy falls of its own weight. The affidavit reveals that Noone was aware of the existence of only Steinberg and his source. Even the proposed large delivery of PCP originating from the out-of-state laboratory was to come through this same source. Before the wiretap the

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*The Government's contention that there is an automatic exception to the §2518(1)(c) requirement for alleged violations of the wire communications statute (21 U.S.C. §843(b)) is patently without merit. Section 2518(1)(c), by its own terms, prescribes no such exception, and the other means of investigating such a crime (an agent's participation in the phone calls, his presence with the caller when the calls were made, or the use of an informant) are virtually as effective as they are in any other investigation.

agents already knew that this source was to arrive at Steinberg's apartment at a specifically designated time. Nowhere in the affidavit is there any indication of a complex hierarchy of drug distribution which would have been unsusceptible to detection by any means other than a wiretap.

Because the affidavit in support of the application was fatally deficient, the order granting the wiretap was invalid and the tapes of the conversations must be suppressed.

II

By reference to Steinberg's description of his partnership with Ricky Citrola as one in which Citrola supplied customers for Steinberg's goods, the Government would have this Court believe that that fact somehow nullified Citrola's knowledge of Steinberg's source and his use as an informant. On the contrary, the evidence presented at trial -- of Citrola's actual awareness of "Mickey and Billy," his intimate business relationship with Steinberg, his proposed handling of Steinberg's operation when the latter was on vacation (Capo Main Brief at 11-13) -- indicates that Noone's assertion of no undercover access to Steinberg's suppliers was untrue. Thus, the Government's argument on appeal only further supports the need for a hearing to resolve the factual dispute.

From the outset of the motion to suppress, defense counsel asked for a hearing to resolve what he viewed as major

discrepancies, not only within the confines of Noone's affidavit itself, but also the conflicts between allegations in the affidavit and other evidence in the case. Just such a hearing was held in United States v. Falcone, 364 F.Supp. 877, 890-893 (D.N.J. 1973), affirmed, 500 F.2d 1401 (3d Cir. 1974), the case relied on so heavily by both the Government in opposing the motion to suppress and by Judge Ward in denying the motion.

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant Capo, the judgment must be reversed, the wiretaps ordered suppressed, and the case remanded for a new trial; alternatively, the case must be remanded for a hearing on the motion to suppress the wiretaps.

Respectfully submitted,

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